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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RICHARD CLARKE et al., Plaintiffs, Cross-Defendants and Appellants, v. TOM T. FUKUDA et al., Defendants, Cross-Complainants and Respondents.	H023228 (Santa Clara County Super. Ct. No. CV788342)

In this appeal, plaintiffs, cross-defendants and appellants Richard and Janna Clarke (the Clarkes) challenge the trial court's judgment in favor of defendants, cross-complainants and respondents Tom T. and Mitsue Fukuda (the Fukudas). In 1999, the Clarkes bought a downhill vacant lot next to the lot owned and occupied by the Fukudas since 1972. The Clarkes' lawsuit challenges the validity of a restriction over their property (Lot 4) in favor of the Fukudas' property (Lot 5) for overflow septic drainfield purposes.

The trial court denied the Clarkes' motion for summary judgment on the grounds that they failed to meet their burden of demonstrating that the restriction against their property was invalid as a matter of law. The trial court granted the Fukudas' motion for summary judgment on the grounds that the Fukudas had shown on the undisputed facts

that the Clarkes' causes of action for quiet title and declaratory relief have no merit. The trial court concluded that the Fukudas are entitled to judgment, establishing that the Clarkes cannot succeed in their action to quiet title against the Fukudas' rights over the Clarkes' property as an overflow septic drainfield. The Clarkes appeal these rulings. The Clarkes also appeal the trial court's prior rulings sustaining the Fukudas' demurrer to the third and fourth causes of action of the Clarkes' complaint.

The Clarkes also sued the County of Santa Clara, which originally approved the subdivision map in 1965. Both the Fukudas and the county have responded to the appeal.

FACTS

The Fukudas have owned Lot 5 since 1972 and lived in their residence on the property since it was built that year. The Clarkes' Lot 4 is downhill from the Fukudas' Lot 5, and has been vacant and undeveloped since the subdivision was approved in 1965. Lot 4 was owned continuously by the subdivider and its successor in interest from the inception in 1965 until 1997.

The creation of the subdivision in 1965 is evidenced by four documents: (1) the recorded final tract map with owner's certificate; (2) the recorded declaration of restrictions; (3) the recorded first amendment to the declaration of restrictions; and (4) the second amendment to the declaration of restrictions and revised final map.

On May 4, 1965, the Santa Clara County Engineer approved the development of subdivision tract No. 3975, entitled, "Altamont Hills" (hereinafter "Altamont Tract"). On May 4, 1965, the County of Santa Clara Board of Supervisors approved the tract map (Tract Map). The Tract Map for the Altamont Hills tract No. 3975, which is referenced in all the relevant deeds, consisted of the following two pages: (1) a first page of the Tract Map which has engineers' and other certificates including an "Owner's Certificate" setting forth the covenants and restrictions placed on the land and approved by the county; and (2) a second page with a plat map depicting Lots 4 and 5 and the other lots

graphically. The Tract Map was approved by the county and recorded with the Santa Clara County Recorder on May 16, 1965.

The owner's certificate on the first page of the Tract Map states: "We hereby certify that . . . we are the only persons whose consent is necessary to pass a clear title to said real property; that we hereby consent to the making of said map and subdivision . . . . [¶] . . . [¶] We also hereby dedicate for the exclusive use of owners of lots within this subdivision both present and future the following: . . . [¶] The entire property shown as parcels A, B, C, and D . . . and *lots 4*, 6, and 8 (which lots may be building sites upon termination of septic tank drainfield easements) are *subject to easements for septic tank drainfields* as follows: Parcel A servient and appurtenant to lot 12. . . . *Lot 4 servient and appurtenant to Lot 5*. Lot 6 servient and appurtenant to Lot 7. . . . [¶] When sanitary sewers are installed, connected and approved for any of lots 5, 7, 9, 12, 17, 20, and 22, the septic tank easement over the corresponding servient tenement shall terminate." (Italics added.) It is uncontroverted that sanitary sewers have not yet been made available to this area.

The deeds conveyed from the developer, and all subsequent transfers of Lots 4 and 5, referred to the recorded Tract Map, including the first page with its owner's certificate, for the description of the property. The grant deed to the Clarkes, and the deeds to all in their chain of title, stated the following basic description of the property: "Lot 4, as shown on that certain Map entitled Tract No. 3975, which Map was filed for record in the office of the Recorder of the County of Santa Clara, State of California on May 17, 1965, in Book 194 of Maps page(s) 34 and 35." Page 35 is the plat map or drawing of the lots. The referenced page 34, however, is the first page of the Tract Map and has the owner's certificate which specifically states that the lots are "subject to easements for septic tank drainfields as follows: . . . Lot 4 [the Clarkes' property] servient and appurtenant to Lot 5 [the Fukuda property]."

Prior to the Tract Map being approved, the developers had applied to the county health department for approval of the subdivision. In the county's letter of April 8, 1965, it approves on the same condition, that "lots 4, 6, and 8 . . . are subject to easements for septic tank drainfield expansion areas as follows: . . . Lot 4 servient and appurtenant to lot 5." The letter then sets out the drainfield requirements for the lots of the subdivision, including expansion areas into neighboring lots such as Lot 4. The health department's letter opines that the sewage disposal systems so constructed can reasonably be expected to function, but that any changes in the lots would result in voiding of approval of the subdivision and necessitate resubmission.

On May 9, 1966, the subdividers executed and recorded a declaration of restrictions affecting tract No. 3975, with the Santa Clara County Recorder's Office. The declaration of restrictions indicates an intent that restrictions on lots would be binding and would run with the land, stating: "Declarant is about to sell said Lots which it desires to subject (except for Lot 21) to certain restrictions, conditions, covenants and agreements between the Declarant and the purchasers of said lots, as hereinafter set forth . . . [¶] . . . [¶] A-5. Easement. Easements for . . . drainage facilities shall be as depicted on the final recorded subdivision map. . . . [¶] . . . [¶] D-1. Terms. All of these restrictions, conditions, covenants and agreements shall affect all of the lots except Lot 21 as hereinabove set forth and are made for the direct and reciprocal benefit thereof, and in furtherance of a general plan for the improvement of said tract, and the covenants shall attach to and run with the land. Said restrictions, conditions and covenants shall be binding upon all parties and all persons claiming under them . . . ."

A first "Amendment" was filed to the declaration of restrictions the following week on May 13, 1966. Two weeks later, on May 31, 1966, the subdividers recorded a "Second Amendment to the Declaration of Restrictions Affecting Tract No. 3975" together with a revised final map at book 7740, pages 533 through 553. The revised final map has a legend over Parcel 4 that indicates it is held in "Reserve." The declaration of

restrictions defined "Reserve" to mean, as follows: "Should future expansion of septic systems into reserved portions of the Common Area be necessary, this association shall have the power to require the lot owners using the same landscape such septic system areas and to continuously maintain them. The maintenance of *parcels held in reserve for future septic system expansion shall be included in the maintenance of the Common Area until such time as sewers are available*." (Italics added.)

These four documents were recorded in the official records when the Fukudas purchased their Lot 5 in 1972. The Fukudas met with Maurice Johnson, representing the subdivider, to purchase a home on Lot 5. Johnson advised Fukudas that there were no sanitary sewer systems; he also told them that their property would be served by a septic system and leach field. At that time, the Fukudas understood the recorded documents stated that Lot 4 would be reserved for Lot 5 for septic purposes. Johnson also advised them that Lot 4, which was downhill from the Fukudas' lot, would always be reserved for them and future owners of Lot 5 until sewers were installed. The Fukudas state they believed and relied upon all of these representations made by Johnson. The Fukudas reviewed the subdivision map and believed upon reading the map, that Lot 4 was reserved for the use of Lot 5. After purchasing in 1972, Johnson and the Fukudas discussed the possibility of the Fukudas' potential purchase of Lot 4 in fee, but nothing came of those discussions. The Fukudas have lived on Lot 5 since 1972, when their home was built. The Fukudas declare that the county required them to direct their septic system towards Lot 4 because of a stream on the other boundary of their property.

The Fukudas also received the California Department of Real Estate Final Subdivision Public Report, or so-called "white paper," that was to be distributed to all purchasers of interests in the subdivision (Bus. & Prof. Code, §§ 11004.5, 11010, 11018, 11018.1). The report explained that there are "[e]asements affecting certain lots for . . . septic tank and other purposes" that may be determined by reviewing the various

recorded documents. It goes on to specifically mention that "Lots 4, 6, and 8 . . . are subject to easements for septic tank drainfield expansion areas."

Lot 4 has remained undeveloped during the last 30 years, the entire time the Fukudas have owned their home. The subdivider retained title to Lot 4 from 1965 until 1997 when it was sold. In more detail, in 1965, title to the entire Altamount Hills subdivision was in Western Title Guarantee Company (WTGC), although J & R Company was the subdivider as listed on the final subdivision public report. On February 14, 1997, Fidelity National Title Insurance Co., which was successor to WTGC, conveyed Lot 4 to J & R Company.[1] One week later on March 7, 1997, J & R Company conveyed the property to Lee B. Hall and Elaine M. Hall. The Halls held the lot, except for various conveyances between themselves, for two years, at which point they sold Lot 4 to the Clarkes on March 16, 1999. The 1999 Clarke deed to Lot 5 contained the same sort of conveyancing language as the Fukudas' deed which described the real property "Lot 4, *as shown on that certain Map* entitled Tract No. 3975, which Map was filed for record in the office of the Recorder of the County of Santa Clara, State of California on May 17, 1965, in Book 194 of Maps *page(s) 34 and 35*." (Italics added.)

Before purchasing Lot 4, the Clarkes exchanged correspondence with real estate broker, Sam Fung of Cortland Properties. Fung advised the Clarkes that the value of Lot 4 without resolution of sewage issues would be in the price range of $180,000, while the value of the property with sewage issues resolved would range from $400,000 to $500,000. The Clarkes were also advised that the repair of a failed septic system could cost up to $40,000 and that homes in the area were valued from $1.1-$1.5 million.

[1] J & R Company, a general partnership, is the developer or "sub-developer" which had obtained the 1970 final subdivision public report. The title company in a common arrangement holds title to the property and conveys to the developer upon sales being made.

Lee Hall, who had purchased the lot from the developer in 1997 and owned it, also owned a home in the same "Altamonte Hills" subdivision, where he had been president of the homeowners association for some years. The broker Mr. Fung advised Clarke, that Hall had disclosed there were active discussion of sewage issues and extension of a sewer line to the development in the association since some homes had experienced sewage problems. Referring to the lack of a sewer line to the area, Fung added, "Obviously septic tank system [*sic*] is not the ideal sewage disposal solution for rainy days, etc." The Clarkes also communicated directly with Hall on these subjects.

With this information, the Clarkes' investigated and found the existing septic systems were not up to current standards. They learned a similar septic tank system to that on the other lots was not likely to be approved under current rules for the subject lot, and extension of a sewer line from neighboring cities was unlikely to occur in the near future. Richard Clarke wrote to his broker on February 18, 1999, advising him of his concerns and telling him to reduce the price he was offering to go forward with the purchase, saying, "after examining the sewage disposal issue in depth, I feel that resolution of this is very unlikely." He continued: "However, I do think that this property is very attractive and even considering the risk I believe it has some speculative value." On March 16, 1999, sale was completed to the Clarkes.

During the summer of 1999, the Clarkes called upon the Fukudas to discuss the septic easement issue. In subsequent correspondence, after discussing various issues concerning loss of open space, future septic repairs, and home valuation, the Clarkes offered to purchase the septic easement from Fukuda for $25,000. The Clarkes maintain this offer was in pursuit of settlement since the Clarkes also expressed their position in their letter to the Fukudas that the septic easement was likely to be held invalid.[2]

[2] The Clarkes also protest that the evidence is inadmissible under the hearsay rules or the requirement for authentication of documents. (Evid. Code, §§ 1200, 1400.) As a general rule, inadmissible evidence cannot support or defeat a summary judgment.

The Fukudas declined to sell the easement. The County of Santa Clara also informed the Clarkes in a letter of January 7, 2000, that, in its view, it had accepted the easement burdening Lot 4, and that Lot 4 was unbuildable unless the Fukudas' property was served by a sanitary sewer or unless the county removed the restriction. The county advised that for it to approve of removal of the condition in the approved map, the Fukudas and possibly others in the subdivision would also have to approve; moreover, it would have to be shown that the Fukudas had an adequate drainfield expansion area to current standards without using Lot 4 for expansion. The Clarkes filed this lawsuit on March 8, 2000.

DISCUSSION OF LEGAL ISSUES

I. *Standards of Review*

The case was ultimately disposed of by summary judgment. The summary judgment motion was properly granted if there were no disputed questions of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

For summary adjudication, a moving defendant must show that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Aguilar, supra*, 25 Cal.4th at p. 849.) Here, a defense to the first cause of action for quiet title would be the Fukudas' establishing undisputed facts showing they have an interest in the Clarkes' lot

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(*Craig Corp. v. County of Los Angeles* (1975) 51 Cal.App.3d 909, 915.) In any event, whether the Clarkes made an offer to purchase the purported rights, even if admissible, is irrelevant to the determination of whether such rights exist. (Evid. Code, §§ 351, 1152.) The evidence does show that the Clarkes were aware of the restriction and had had their attorneys research it no later than the date of the correspondence in August 1999. Yet, the restrictions were of record so that constructive notice of them is not fundamentally disputed. The essential facts for determination of the motions are in the recorded documents, however, such that none of this evidence plays a decisive role.

for a septic drainfield expansion. Since the motion is decided on written submissions, on appeal this court exercises its independent judgment in determining whether there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.) When a motion for summary judgment has been granted, we review the record de novo and consider all the evidence set forth in the moving and opposition papers. (*Aguilar, supra*, 25 Cal.4th at p. 860; *Saldana v. Globe-Weis Systems Co*. (1991) 233 Cal.App.3d 1505, 1511-1515.)

An earlier demurrer had been sustained by the trial court to the Clarkes' third and fourth causes of action. These attempted to plead separate declaratory relief causes of action, in addition to the quiet title and declaratory relief causes of action in the first and second causes of action. The third cause of action isolated language in the owner's certificate which indicated that the septic drainfield easement would only exist if "there is not an adequate drainfield in the corresponding dominant tenement" and pleaded as a fact that the drainfield in Lot 5 was adequate without use of Lot 4. The fourth cause of action separately pleaded that Santa Clara County Ordinance section B11-13, subdivision (n) enacted in 1990 does not allow any private sewage disposal system to cross a property line, thus allegedly voiding the restriction on Lot 4. The trial court sustained the demurrer, stating that these were not properly causes of action for "declaratory relief within the scope of Code of Civil Procedure [section] 1060" and further that "the issues sought to be adjudicated are encompassed within Plaintiffs' First cause of action" (for quiet title).

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]'

[Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; accord, *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Properly, then, the trial court was not restricted to determining whether the third and fourth causes of action were correctly labeled as *declaratory relief*; it and we must review the pleading of these causes of action to determine whether they could be amended to state a cause of action under "any possible legal theory." (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967.)

The Fukudas argue that, even if it were error to sustain the demurrer (on the ground of failing to plead a proper declaratory relief action), it did not *prejudice* the Clarkes. The Fukudas note that the trial court's order specifically invited the Clarkes to make the same factual arguments of the third and fourth causes of action within their first cause of action. The Fukadas argue that the Clarkes then made or could have made the factual arguments in support of their summary judgment motion and in their response to the Fukudas' motion. Thus the additional *harmless error* standard of review is proposed, arguing that the order sustaining the demurrer must be *prejudicial*. *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, held that a court may find that "the error was harmless, because it is not reasonably probable defendant would have obtained a more favorable result in its absence. (E.g., *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 []; see Cal. Const., art. VI, § 13; Code Civ. Proc., §475.)" (*Id*. at p. 570.) Code of Civil Procedure, section 475 requires that a court "disregard any . . . improper ruling, . . . unless . . . such error, . . . was prejudicial." We examine the summary judgment motions on the first and second causes of action, therefore, with the added perspective of

reviewing whether they permitted the Clarkes to make their factual arguments under the causes of action to which demurrer was sustained.[3]

II. *Legal And Factual Issues*

A. *The Restriction is Not Invalid Because of Failing to Create an Interest In the Land "of Another"*

The Clarkes argue that because an easement or covenant must create an interest in the land "of another," the interest created here was invalid. They base this claim on the fact that the developer owned both parcels at the time of the purported dedication. Under the law pertaining to creation of easements (and covenants running with the land), they argue, the developer could not grant an easement to itself, and that the related doctrine of merger prevents establishment of the easement during that time.

The Clarkes argue, therefore, that it was required that there be later granting documents between the owners of the lots, or express reservation of the subject rights in the recorded deed between grantor and grantee.

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[3] Demurrer to declaratory relief actions, although technically infirm, does not prevent the court from holding that the declaratory relief actions are effectively foreclosed by the legal rulings on the quiet title cause of action. As said in *Taschner v. City Council* (1973) 31 Cal.App.3d 48, disapproved on another point in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596: "Strictly speaking, a general demurrer [or dispositive motion] is not an appropriate means of testing the merits of the controversy in a declaratory relief action because plaintiff is entitled to a declaration of his rights even if it be adverse. [Citations.] However, where the issue is purely one of law, if the reviewing court agreed with the trial court's resolution of the issue it would be an idle act to reverse the judgment of dismissal for a trial on the merits. In such cases the merits of the legal controversy may be considered on an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend and the opinion of the reviewing court will constitute the declaration of the legal rights and duties of the parties concerning the matter in controversy. [Citations]." (*Taschner v. City Council, supra,* 31 Cal.App.3d at p. 57, fn. omitted; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 872-873; *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 383.) We will, therefore, gauge whether the summary judgement resolved issues of law making remand for declaratory relief unnecessary.

1. Analysis of Restriction as an Equitable Servitude

Prior to analysis as an *easement*, it should be noted that California law has long upheld subdivision restrictions as equitable servitudes. If the Clarkes were correct concerning some fault in creation of the easement, and that is in doubt as shown below, it is not ultimately necessary to decide that question if an equitable servitude also burdens the property.

In support of the Clarke's theory that an explicit easement in the deeds to them and their predecessors was required to create a restriction, they cite *Rosebrook v. Utz* (1941) 45 Cal.App.2d 726 (*Rosebrook*), quoting in turn *Lampman v. Milks* (1860) 21 N.Y. 505, 507. They quote the first two clauses from the following more complete excerpt from *Rosebrook*: "No easement exists, so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts; but the moment a severance occurs, by the sale of a part, the right of the owner to redistribute properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal; hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." (*Rosebrook, supra,* 45 Cal.App.2d at p. 729.)

The actual import of this statement for the *Rosebrook* case, is that obvious burdens at the time of a sale, such as the road at issue in *Rosebrook,* actually do constitute *implied*

easements at the time of the grant.[4] The opinion does not state that a common owner is prohibited from burdening lots that are part of a subdivision, by a statement of covenants, conditions or restrictions ("CC&R's") or a map referred to in the deed.

In fact, existence of conditions, covenants and restrictions, or a map has been held to be one of the means of showing that a burden exists in "the condition of the property at the time of sale." (*Rosebrook, supra*, 45 Cal.App.2d at p. 729.) The restriction on lots by a subdivider through CC&R's is not a new phenomenon. It does not require that the subdivider state in each deed the contents of recorded statements of conditions and restrictions. Prior to *Rosebrook, supra*, 45 Cal.App.2d 726 in *Marra v. Aetna Construction Co*. (1940) 15 Cal.2d 375, 378-379, the Supreme Court summarized the long-accepted law: "Even though a covenant does not run with the land, it may be enforceable in equity against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit him to avoid the restriction. [Citations.] *The doctrine of equitable servitudes has been invoked chiefly in cases where uniform building restrictions have been imposed pursuant to a general plan for improving an entire tract or real estate subdivision*, but it is by no means true, as the respondents contend, that the doctrine is restricted to such cases. *Tulk v. Moxhay*, 41 Eng. Rep. 1143, in which the doctrine was first applied, was itself a case involving restrictions imposed upon a single lot. . . . [Citation] . . . . [Citation.] . . . [Citations.] But, if the original purpose of the covenant can still be realized, it will be enforced even though the unrestricted use of the property would be more profitable to its owner. [Citation.]" (Italics added.)

These rules concerning subdivisions exist in essentially the same form to the present, and have been enhanced to provide these servitudes with the force of covenants

[4] There are other ways of establishing easements by implication, including by filing of subdivision maps showing the easement, as will be further detailed below.

running with the land. In *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345 (*Citizens*), the Supreme Court enforced on behalf of complaining neighbors restrictions against the defendant Andersons keeping a vineyard and llamas on their property. In that case, the Andersons made a similar argument to that of the Clarkes here, that nothing in their deed mentioned the restriction or referenced the " 'Declarations Imposing Covenants, Restrictions and Agreements' " and " 'Declaration Imposing Covenants, Restrictions, Easements and Agreements,' " that the developers had recorded prior to any lots being sold in the subdivisions. (*Id*. at pp. 349-350.) "The Andersons argue that the CC&R's never took effect because they were not mentioned in the deeds to their properties." (*Id*. at p. 360.) The Supreme Court reversed both lower courts, which had refused to enforce the restrictions, finding the restrictions enforceable because they had been recorded.

In *Citizens, supra,* 12 Cal.4th 345, the Supreme Court engaged in a lengthy analysis of this law, which it admitted had been called " 'an unspeakable quagmire' " (*Id*. at p. 352, quoting, Rabin, Fundamentals of Modern Real Property Law [1974] p. 489.), and " 'the most complex and archaic body of American property law remaining in the twentieth century.' [Citation.]" (*Id.* at p. 348, quoting French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands* (1982) 55 So.Cal.L.Rev. 1261.) The court summarized anew: "Modern subdivisions are often built according to a general plan containing restrictions that each owner must abide by for the benefit of all. 'Ordinarily, a general plan of restriction is recorded by the subdivider grantor for the purpose of insuring the uniform and orderly development and use of the entire tract by all of the original purchasers as well as their successors in interest. . . . These subdivision restrictions are used to limit the type of buildings that can be constructed upon the property or the type of activity permitted on the property, prohibiting such things as commercial use or development within the tract, limiting the height of buildings,

imposing setback restrictions, protecting views, or imposing similar restrictions.' [Citations.]" (*Ibid*, quoting *Sain v. Silvestre* (1978) 78 Cal.App.3d 461, 466.)

The court then recounted the history that, under common law and under former wording of Civil Code, section 1468, it had been required that a restriction appear in deed between landowners for a covenant to run with the land. Even then, restrictions had been enforced as equitable servitudes: "Beginning with the 1848 English decision of *Tulk v. Moxhay* (1848 Ch.) 41 Eng.Rep. 1143, courts of equity sometimes enforced covenants that, for one reason or another, did not run with the land in law, and the separate doctrine of equitable servitudes arose. [Citation.] California adopted this doctrine, and it accumulated its own body of rules. [Citation.] Because of the statutory limitations on covenants running with the land, at least before [Civil Code] section 1468 was amended, California courts have '[t]raditionally' analyzed CC&R's under the doctrine of equitable servitudes. [Citations.] [¶] In 1968 and again in 1969, [Civil Code] section 1468 was amended to make covenants that run with the land analytically closer to equitable servitudes. Today, that statute applies to covenants between a grantor and grantee as well as between separate landowners. [Citation.] Covenants governed by the amended statute might run with the land even if they formerly would not. [Citation.]" (*Citizens, supra*, 12 Cal.4th 345 at pp. 353-354, fn. omitted.)

The *Citizens* court then faced the issue of what occurs when the restrictions are not explicitly mentioned by reference to CC&R's in the deeds from the grantor. It held as follows: "[I]f the restrictions are recorded before the sale, the later purchaser is deemed to agree to them. The purchase of property knowing of the restrictions evinces the buyer's intent to accept their burdens and benefits. Thus, the mutual servitudes are created at the time of the conveyance even if there is no additional reference to them in the deed." (*Citizen, supra,* 12 Cal.4th at p. 363.) The Supreme Court specifically rejected prior cases implying otherwise: "Some of the prior cases, however, simply assumed that the deeds must *expressly* refer to the restrictions to evidence the purchaser's

intent and agreement. On the contrary, it is reasonable to conclude that property conveyed after the restrictions are recorded is subject to those restrictions even without further mention in the deed." (*Id*. at p. 365.)

Even assuming, then, that *easements* were not properly created by the way in which the deeds were drafted here, still restrictions survive preventing quieting of title against them.

We find, as an equitable servitude, the restriction on use of Lot 4 is valid. The Clarkes' first and primary cause of action for quiet title is thus concluded. It pleads that defendants "claim an interest adverse to the plaintiffs" and that "such defendants have no right, title, estate, lien or interest whatsoever to the CLARKE property or any portion thereof." The question in the quiet title action is whether the Fukudas or County have any "right, title . . . or interest" in Lot 4 that prevents development by the Clarkes until a sewer line is run, not the specific label of the interest. Under the theory of a covenant running with the land, or at least of an equitable servitude, the Clarkes' actual notice of the restriction along with the recorded owner's certificate, declaration of restrictions, the amendments to the declaration of restrictions, and revised final map showing Lot 4 as "Reserved," are more than sufficient to create the septic drainfield restriction at issue. The declaratory relief actions are similarly concluded by this declaration of rights. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 872-873.)

2. Validity of the Restriction as An Easement

The Clarkes argue that the restriction, which is termed an "easement" in the recorded owner's certificate, does not comply with the formalities for creating an easement. The true issue is whether an easement can be reserved by a deed's reference to a description of the property in a recorded map that describes the property as burdened by an easement.

The Clarkes reason that since WTGC owned all of the land at the time of the filing of the owner's certificate, it could not grant an easement to itself as such a grant must to

be in the "lands of another." They cite Civil Code, section 805, which states: "A servitude thereon cannot be held by the owner of the servient tenement." As already explained, this certainly does not apply to the extent that an *equitable* servitude can be created by recorded CC&R's. (*Citizens, supra,* 12 Cal.4th 345.) The Clarkes maintain, however, that it does apply to an easement.

For this the Clarkes cite a number of cases. The holding in none of the cases, however, stands for the precise point that a deed referencing a recorded map cannot create an easement. Other cases state that reference to a map indeed creates an easement.

As shown above, the Clarkes quote *Rosebrook, supra,* 45 Cal.App.2d at page 729, that, "No easement exists, so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts." This appears facially as a statement of the Clarkes' thesis. In fact, however, the *Rosebrook* case found *implication* of an easement, by open use of a road, and had nothing to do with grant by conveyance or map. There was no issue in *Rosebrook* of a recorded owner's certificate or CC&R's, or of a reference to a map in a deed.

Likewise, the Clarkes cite *Mikels v. Rager* (1991) 232 Cal.App.3d 334 (*Mikels*), which actually opines that a designation on a map could have established an easement. Again, there appears, superficially, to be support for the Clarkes: "One cannot grant an easement to oneself; one can only *reserve* such an interest in the land granted to another." (*Id.* at p. 359.) Here, again, the second clause makes clear that the distinction drawn is between *grant* and *reservation*, not a broad statement concerning whether an easement can be reserved by use of reference to a map description. The *Mikels* opinion then notes that the cross-complainants only stated the theory of "granting" themselves an easement, which made analysis of *reservation* of an easement difficult. The *Mikels* court nevertheless goes on to analyze whether the cross-complainants in that case validly pleaded that they reserved a road easement by *implication.* Importantly, the *Mikels* court accepted that a *map* could have established the easement. It noted that the cross-

complainants "did not submit as an undisputed fact that the Mikelses had the requisite knowledge or notice of the alleged preexisting use of the disputed roadway." (*Id*. at p. 360.) The court then continued by analyzing whether the requisite notice could have come from a map reservation, and the court concluded: "The undisputed presence of an unambiguous representation on the map that there was a private easement in favor of the remainder parcel over 'Almond Street,' combined with a deed to the Desimones of Parcel No. 1 which referred to the map, could have supplied the necessary intent on the part of the Kings as grantors to reserve an easement in favor of the remainder parcel to support a conclusion as a matter of law that there had been an implied reservation of an easement." (*Ibid*.) This statement is clearly in favor of the *Fukudas*, not the Clarkes.

Then the *Mikels* court found that cross-complainants "did not establish as a fact that there was such an unambiguous representation" by reference to a subdivision map existed in that case. (*Mikels, supra,* 232 Cal.App.3d at p. 360.) Here, there was a reference to a map.

The Clarkes also cite *Eastman v. Piper* (1924) 68 Cal.App. 554, 561, an irrelevant case in which an easement, as distinct from a license, was found to exist. They also cite *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 361, which also merely contains the language that an "easement is an *interest in the land* of another" but decides the completely separate issue of whether there had been an *implied* public *dedication* of a road.

Such citations to language rather than holdings of cases is not determinative, especially since there is a separate line of cases which hold that recordation of a subdivision map showing easements, and subsequent reference to the map in a deed, serves to establish easements shown on the map. That is the point at issue.

The leading case is *Danielson v. Sykes* (1910) 157 Cal. 686 (*Danielson*). In *Danielson*, a map had been recorded of a subdivision. It showed an alleyway on the opposite side of the street from plaintiff's lot. The alleyway provided a more direct

access for plaintiff to a beach and railway. The defendant had received a conveyance from the developer of a lot adjoining the alleyway facing plaintiff's lot and of the property underlying the alleyway itself. Defendant then fenced the alley and plaintiff sued. The court held that it was "a thoroughly established proposition in this state that when one . . . sells . . . lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any use . . . and that this private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested . . . ." (*Id*. at p. 689.) The court held that "[w]hen a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed." (*Id*. at p. 690; see also, *Prescott v. Edwards* (1897) 117 Cal. 298; *Day v. Robison* (1955) 131 Cal.App.2d 622, 624; *Johnstone v. Bettencourt* (1961) 195 Cal.App.2d 538, 541; *Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9; *Syers v. Dodd* (1932) 120 Cal.App. 444.)

As shown, in *Mikels v. Rager, supra*, 232 Cal.App.3d 334, 360, cited by the Clarkes, the court found that it had not been proposed as a fact that there was a reference in the subdivision map, and that, if there had been a map reference, a finding of an easement could have followed from it. *Mikels* relied in turn on *Metzger v. Bose* (1960) 183 Cal.App.2d 13, overruled on another ground, *Valenta v. County of Los Angeles* (1964) 61 Cal.2d 669, 672, which also stated that it was "not a case of conveyance by reference to a subdivision map which could stand as a representation of the existence of easements." (*Metzger v. Bose, supra,* 61 Cal.2d at p. 15.) For this proposition, the *Metzger* court cites the leading case of *Danielson, supra,* 157 Cal. 686. (*Id*. at p. 18.) These cases, if they state any rule, state that reference to a subdivision map can create an easement.

The Fukudas do rely on *Danielson* and the line of cases of which it is a prominent part. The Fukudas argue on this basis that the map showing the septic easements can

create an easement in their favor. Moreover, they cite *Caffroy v. Fremlin* (1961) 198 Cal.App.2d 176 which states, "A reservation may be made through an instrument collateral to the deed [citations]; . . ." (*Id*. at p.182.)

The Clarkes contend, however, that the rule in *Danielson* refers only to what the Clarkes call *public* easements, that is, to roads and streets or other features of the development shared by all of the owners in the mapped subdivision. These are more properly termed as the *private* easement in streets that other owners in a subdivision receive when the government has not accepted dedication of a *public* easement. (See, e.g. *Danielson, supra,* 157 Cal. 686; *Neff v. Ernst* (1957) 48 Cal.2d 628, 636-637; *Hocking v. Title Ins. & Trust Co.* (1951) 37 Cal.2d 644, 653; *Anderson v. Citizens Sav. etc. Co*. (1921) 185 Cal. 386, 393-396.) The Clarkes misuse the terms "public" and "private" to this extent. The meaning they are trying to convey, however, is relatively clear. They mean that there are some private easements that are "public" to the extent they are shared by all of the property owners in a subdivision, such as to streets. (E.g., *Danielson, supra,* 157 Cal. 686; *Petitpierre v. Maguire* (1909) 155 Cal. 242, 249.) The Clarkes would concede that the rule in *Danielson* applies to make a recorded map sufficient to establish such street easements. They distinguish the situation here as concerning a restriction on their lot, Lot 4, which they argue benefits only one other lot, Lot 5, and which they term a "private" easement.

The Clarkes contend that the rule in *Danielson,* and other cases following it, has never been applied to a specific burden put on one lot benefiting a specific other lot. For such an easement, the Clarkes contend, it is still required that a grantor specifically grant and reserve the easement in the conveyances, rather than in reference to a map.

The Clarkes' argument that a mapped easement cannot apply to create an easement from a single lot to another breaks down into two actual questions here: (1) does the rule in *Danielson* extend to such a situation, and (2) is the septic drainfield

restriction here truly only to the benefit of one lot or to the benefit of many or all lots in the subdivision.

First, enforceability of a mapped easement is not limited to those easements for rights of way or ingress or egress. Citing *Danielson*, defendant contended in *Wool v. Scott* (1956) 140 Cal.App.2d 835, that the designation of a parcel as a "park" was not a valid easement, because, "[i]t is argued that in this state decisions have been confined to establishment of easements appurtenant in rights of way shown on maps where such ways have been necessary or convenient for ingress and egress. [Citation.]" (*Id*. at pp. 845-846.) The court in *Wool* rejected this contention and held that the map designation "sufficiently alleged ownership of an easement in the park." (*Id*. at p. 846.) In turn, the *Wool* decision relies on *Bradley v. Frazier Park Playgrounds* (1952) 110 Cal.App.2d 436, in which the court held that "equitable easement[s]" had been created in lakes, grounds and a clubhouse, shown on original sales maps where no specific easement appeared in a written conveyance.

Thus, it has been established that the rule in *Danielson* goes beyond just streets. It encompasses, at least, park and recreational areas. In principle, there is nothing that would prevent a map easement for a septic drainfield under *Danielson* and its progeny.

The Clarkes claim that the easement may not just favor one lot or burden one lot. But no case supports the proposition and so limits the applicability of the *Danielson* doctrine. The Supreme Court in *Marra v. Aetna Construction Co., supra*, 15 Cal.2d at p. 378 found no such restriction on equitable servitudes, pointing out that the original cases enforcing servitudes concerned only "a single parcel of land." (*Ibid.*)

Moreover, servitudes must, like covenants and easements, benefit a particular parcel of land, or a dominant tenement. (*Chandler v. Smith* (1959) 170 Cal.App.2d 118, 120.) Implication of any easement, in fact, implies a dominant and a servient tenement. "The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." (Civ.

Code, § 803; see, e.g., *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754.) Therefore, the prong of the Clarke's argument that states that a particular piece of property cannot be benefited, as opposed to all properties in the mapped development, is inapt.

The nub of the Clarkes' argument is thus the question of whether an easement can run, based on a map, from a particular property rather than from all properties in a development. There does not appear to be any case cited which states that such an easement cannot exist, and, of course, most such easements do run from one parcel. The easement for the alleyway in *Danielson* and for the park in *Wool v. Scott* burdened one lot in particular. The fact that an easement is created or implied by reference to a subdivision map, in this instance, should not matter, since the rule in *Danielson, Wool v. Scott,* and all following cases specifically authorizes use of such a map to impress an easement. The fact that the burden or benefit of the easement is not uniform throughout the subdivision should not matter. Even the park and street easements benefit more clearly those properties in a subdivision closest to the burdened parcel, or those who need it more for access or recreation, than those lots that are more distant. In *Day v. Robison* (1955) 131 Cal.App.2d 622, 624, the map showed a roadway lying to the west of the granted property on the grantor's land, and the court held the easement was implied just between these two owners. Thus, a map designation is sufficient to create an easement between just two owners. But this is a roadway say the Clarkes. However it is not a "public" roadway applicable to many parcels. The Clarkes contend that the easement created by the map cannot just be between two parcels for something other than a road, when it is clear that (1) a mapped easement can be between just two parcels *for* a road, (2) a mapped easement can just burden *one* parcel, (3) a mapped easement can be for something other than a road, such as a park or recreation area. They argue that all three conditions cannot exist simultaneously, but no authority is cited for that.

Moreover, it is not at all clear that the easement at issue is just to benefit Lot 5. It is indeed said to be "appurtenant to Lot 5" in the owner's certificate which is part of the

Tract Map. Yet, *all* of the easements for septic drainfields were a condition of the entire subdivision being approved. The Tract Map was approved by the county for recording on the basis of the owner's certificate repeating these septic drainfield conditions imposed by the county. Put another way, the developer could not have sold any lots and the owners of all these lots could not have bought any, unless the restriction for a septic drainfield ran over Lot 4. The correspondence from the county makes clear that this was to ensure adequate sanitation in the subdivision, the benefit of which would run to neighbors on all sides. The county maintained that by approval of the Tract Map it accepted it as a dedicated easement.[5] Because we find a valid equitable servitude exists it is unnecessary for us to reach the question of whether the Fukudas also have an easement over the Clarkes' property. Implication of an easement by reference in a property description to a map is well-grounded in the law, and there is no principle we have found that makes such doctrines inapplicable to a septic drainfield easement of one lot over another.

[5] As the county opined to Clarke, it may well be that the consent of other property owners besides the Fukudas would be necessary to extinguish the easement; the others bought upon the basis of the same recorded subdivision map, and upon its general assurance of sanitation in the development, and would have the theoretical right to enforce its restrictions to the same degree as the Fukudas. (Cf., *Citizens, supra*, 12 Cal.4th at p. 351 [neighbors sue for enforcement of restrictions].) Here, for example, Lots 1 and 2 are on the other side of Lot 4 from Lot 5. Their interest in having a buffer zone between them and Lot 5's septic system may be even greater than the interest of the occupants of Lot 5. It is not necessary to decide that issue, here, since the Clarkes sued only the Fukudas. Yet, it does call into question the Clarkes' thesis that the easement is only "private" to the Fukudas and not "public," in the Clarkes' terminology, so that others in the subdivision could enforce it also as dominant tenements.

3. Analysis of the Restriction as a Covenant

On appeal, the Clarkes argue that "[t]he same holds true [as for easements] for whether the 'easement' meets the requirements of Civil Code section 1468," governing *covenants*.[6] Thus, they argue, the restriction is not a valid covenant.

The Clarkes also argue lack of compliance with Civil Code section 1468, itself, which reads in relevant part: "Each covenant, made by . . . a grantor of land with the grantee of land conveyed, . . . to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall, . . . be binding upon each successive owner, . . . where all of the following requirements are met: [¶] (a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants; [¶] (b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee; [¶] (c) Each such act relates to the use, repair, maintenance or improvement of, . . . such land or some

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[6] The effect of finding a difference between easements, covenants and servitudes is not great here, where the issue is whether the Clarke's will be prevented from building on their parcel by its being "reserved" or burdened by the Fukudas' right to use it as a septic drain field. The court in *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1269, holding a similar CC&R restriction on building to be a covenant or servitude rather than an easement, explained: " 'An easement differs from a covenant running with the land and from an equitable servitude, in that these are created by promises concerning the land, which may be enforceable by or binding upon successors to the estate of either party, while an easement is an interest in the land, created by grant or prescription.' (4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 434, p. 615, italics omitted.) A covenant running with the land is created by language in a deed or other document showing an agreement to do or refrain from doing something with respect to use of the land. (*Id*., § 484, pp. 661-662.) An equitable servitude may be created when a covenant does not run with the land but equity requires that it be enforced. (*Id*., § 493, p. 670.)" Clearly, the restriction would be the same.

part thereof, . . . [¶] (d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated." (Civ. Code, § 1468.)

The Clarkes contend that, as with an easement, there could not be a grantor and grantee at the time of the creation of the covenant, because all the property was owned by WTGC, and the other formalities are also not fulfilled by reference to the Tract Map in the deed.

A similar contention was rejected in *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 389, where the court reiterated: " '[T]he declarations of restrictions run with the land and bind appellants even though they were not parties to the deed restrictions.' [Citation.]" (See also *Soman Properties, Inc. v. Rikuo Corp.* (1994) 24 Cal.App.4th 471.)

Moreover, on the facts here, there is little need to argue these points. The property description here, itself, does include reference to the document creating the precise restrictions at issue, as part of the description of the parcel conveyed. The grant deeds to the Clarkes and all in their chain of title stated the following basic description of the property: "Lot 4, as shown on that certain Map entitled Tract No. 3975, which Map was filed for record in the office of the Recorder of the County of Santa Clara, State of California on May 17, 1965, in Book 194 of Maps page(s) 34 and 35." The referenced *page 35* is the drawing or plat of the lots, but the referenced *page 34* is not a drawing but instead the owner's certificate that specifically states that the lots are "*subject to easements for septic tank drainfields as follows: . . . Lot 4 servient and appurtenant to Lot 5*." The deed to the Fukudas was identical for Lot 5, also referencing "page(s) 34 and 35" of county records on which the restrictions are set forth. The Fukudas argue that this reference to a map operates in the same manner as it does for easements. At the time of the conveyance to the Clarkes' predecessor, the grantor did make a reservation of the easement by reference to the map. Under *Danielson*, *supra*, 157 Cal. 686, such reference

to a map description containing an easement puts the restriction into the deed. There is no principle that would make a covenant more difficult to create.

The Clarkes also complain that the declarations of restrictions does not reference the lands to be affected by the alleged restriction. The declaration of restrictions does also recite, however, the property description as being at "Map(s) at pages 34 and 35." Page 34, again, is the place where Lot 4 is made "servient" to Lot 5 "for septic tank drainfields." Page 35 shows the location of Lot 4. The clear import is that the description of the location of the easement, which the Clarkes say is also vague, is all of Lot 4, as the expansion area for Lot 5's drainfield.

This reference in the declaration of restrictions, and the designation of Lot 4 being "servient," is certainly enough to create a "servitude," even if it fails some requirement of an easement or covenant. That a covenant can be equitably created by just such a declaration of restrictions as were recorded here is the point of the Supreme Court's holding in *Citizens, supra*, 12 Cal.4th at page 354, regardless of specific mention in any deeds of the restriction or that a documents creates a restriction. This was recognized by the dissent in that case. (*Id*. at p. 382 (dis. opn. of Kennard, J.).)

The issue in this suit is whether the Clarkes can quiet title to build on their lot regardless of the septic drainfield restriction, not the specific label of the Fukudas' interest. It would upset established law, that allows subdividers to create restrictions on lot use in subdivisions, and for county planners to approve subdivision maps on that basis, for a court to quiet the title of the Clarkes against the drainfield restriction imposed on their lot.

B. *The Restriction is Not Invalid Because of Passage of County Ordinance B-11-13.*

The Clarkes maintain that even if the easement or restriction was validly created, it is defeated by Santa Clara County Ordinance Code section B-11-13, subdivision (n), passed in 1990, which states: "No part of any private sewage disposal system shall cross

any property line." The Clarkes argue, in effect, that the Ordinance would prevent any expansion of the drainfield over the "property line" from Lot 5.

The Fukudas and the county maintain that the ordinance cannot retroactively affect the rights already established. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 ["[a] basic canon of statutory interpretation is that statutes do not operate retroactively unless the Legislature plainly intended them to do so"].)

The Clarkes cite *American Nat. Ins. Co. v. Low* (2000) 84 Cal. App. 4th 914, 925, to propose that a later-passed ordinance governs, but the Fukudas are correct that the quoted language makes provisions occurring "later *in the statute*" controlling, not statutes occurring later in time.[7] (*Ibid,* italics added.)

The Clarkes also cite *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487 (*Teachers Ins.*), in which the easement of a commercial property owner to use the other half of an alleyway bordering on residential apartments was at issue. The easement was invalidated as *always* in violation a zoning ordinance making that area a residential zone. The *Teachers Ins.* case concerned the somewhat specialized topic of the police power in zoning. While it did invoke a zoning ordinance to overcome an easement between owners to share the alley, the retroactivity and preexisting use was not the primary issue. Moreover, there were no analogous facts in *Teachers Ins.* to the situation here where the county itself had required that the developer dedicate the lot at issue to septic expansion purposes.

More importantly, the Fukudas rightfully point out that Santa Clara County Ordinance Code Ordinance section B-11-13 does not invalidate the septic restriction by its terms. First, the "sewage disposal system" referred to in the ordinance is more

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[7] The language is: "It is only where apparently conflicting provisions cannot be harmonized that the provision which is found later in the statute or which is more specific controls the earlier or more general provision. [Citations.]" (*American Nat. Ins. Co. v. Low,* 84 Cal.App.4th at p. 925.)

properly interpreted to be the septic tank system itself, which does lie wholly on the Fukudas' property. The drain field expansion area is for the situation where the system overflows in heavy use or rain or if the system may need to come closer to the property line, upon repair.

Secondly, and more importantly, in Santa Clara County Ordinance Code Ordinance section B-11-13, itself, subsection (f), it is specified that the county "director reserves the authority to require an additional area of property suitable for one hundred (100) percent expansion of the subsurface leaching system, to be designated and reserved." This matches the terminology of what the Tract Map provided in this original subdivision. In 1965, the county required and the Tract Map "reserved" an "expansion" area over Lot 4 for the septic system of the Fukudas on Lot 5. This was a condition for approval of the subdivision and is echoed in Santa Clara County Ordinance Code Ordinance section B-11-13.

Until a sewer line is run, moreover, both the Fukudas and the county have this "reservation" of rights for a drainfield expansion over Lot 4. This makes it, in effect, part of, or under the control of, Lot 5 until sewers are run. It is open to question whether the drainfield even crosses a "property line" to bring it within Santa Clara County Ordinance Code Ordinance section B-11-13 in the first instance. It is only when a sewer line is run to the development that Lot 4 is freed of this reservation and it truly exists as a separate property. When the sewer line is run, at that point, the owner's certificate states that "the septic tank easement over the corresponding servient tenement shall terminate."[8]

The Clarkes maintain that if or when the Fukudas would expand or reinstall their septic tank or drainfield, to make use of the Lot 4 drainfield expansion, the Fukudas will then be in violation of Ordinance B-11-13. Therefore, the Clarkes argue, the issue of

[8] The Clarkes understood that even Lot 4 itself was not likely to qualify for a septic tank under current—or even prior—regulations which call for such an expansion area.

retroactivity is not implicated since such repair would be in the future and governed by the ordinance then. The county, which would be the party to enforce its own ordinance, in its brief, argues that the restriction over Lot 4 does not violate the ordinance. In any event, the Fukudas' repair of their system has not occurred and is not ripe for adjudication. If the county attempts to invoke the ordinance against the Fukudas, against its current position, the issue would be joined.

C. ***The Clarkes Do Not Carry the Burden of Showing that the Easement is Defeased Because The Dominant Tenement Has An Adequate Drainfield.***

The Clarkes' third cause of action prayed for "declaratory relief" against drainfield restriction based on the following wording of the owner's certificate: "The septic tank drainfield easements over lots 4, 6, and 8 shall not be exercised unless there is not an adequate drainfield in the corresponding dominant tenement."

The Clarkes alleged in the third cause of action that the drainfield existing on Lot 5 would always be adequate for reasonable use of Lot 5, and therefore, the easement does not exist or is defeased. They argue that they were willing to prove these facts until demurrer was sustained to the cause of action.

There are several reasons to reject this claim of error. First, the order sustaining demurrer said that it was doing so because the cause of action was not properly one for "declaratory relief within the scope of Code of Civil Procedure [section] 1060" and further that "the issues sought to be adjudicated are encompassed within Plaintiffs' First cause of action" (for quiet title). The Clarkes clearly were not foreclosed from making their factual argument about the adequacy of the Fukudas' septic system within the summary judgment motions concerning their first cause of action. Yet, the summary judgment motions and oppositions contain no expert opinion or other evidence raising a triable issue of fact on this score. The Clarkes did argue the issue of Santa Clara County Ordinance Code Ordinance section B-11-13 on summary judgment, although demurrer to the fourth cause of action on that topic was also sustained. They clearly understood they

had the right to make all their arguments about title in their first cause of action for quiet title. The third cause of action basically proposed that the easement could be and had been defeased by the situation on the ground, but proof of that was not produced in the motions.

Secondly, it is highly unlikely that such evidence could be other than conjectural. An opinion about the future adequacy of a septic tank system and that it would not require an expansion drainfield, would be dependent not only on the use put to it by whoever occupied the dominant tenement now or in the unknowable future but also depend on predictions of future rainfall, ground saturation conditions, geologic changes and other factors. Even if the Clarkes had proposed an expert declaration, the expert would have to speculate as to what would occur in a situation where possibly 10 or 15 people or more occupied the Fukudas' residence, or the strain on the septic system if they held wedding receptions for 200, or the situation occurring in a 100 year storm or saturation conditions. Counties commonly enact building codes to deal with earthquakes, floods and other rare events that may not occur in an injurious magnitude for hundreds of years because of the general threat to health and welfare. It is competent for the county to require that an expansion area for a septic drainfield be adequate to deal even with improbable eventualities to prevent even the possibility of sewage overflow and resulting disease and contamination. The Clarkes' offer in the complaint or here to prove that Lot 5 is adequate for "reasonable" replacement uses is not adequate to overcome this impediment.

More importantly, the language in the owner's certificate is not susceptible to such a method of defeating septic easements by adducing a prediction of "adequacy" of the dominant lot to handle its own sewage. Rather, the quoted language of the owner's certificate speaks of dominant owners not "exercising" the right to build a septic drainfield onto the easement areas "unless there is not an adequate drainfield in the corresponding dominant tenement." The sentence follows immediately a sentence that

states that the easements shall terminate when sewer lines are installed. The clear meaning of the sentence is that no dominant property owner should use the downslope expansion area until necessary because, when sewers are installed, the developer wanted to retain the burdened lots, to the maximum extent possible, in pristine shape to sell. That is the import of the condition. It does not mean that servient property owners can now come to court *en masse* to prove that dominant tenements would always meet some sort of "reasonable" septic standard and thus that county and map requirements of expansion drainfields are unnecessary.[9]

Because the Clarkes do not carry the burden of showing a triable issue that the adequacy of the drainfield in the Fukudas' lot defeats the restriction on Lot 4, under the relevant documents, the demurrer was properly sustained.

DISPOSITION

For the foregoing reasons, we affirm the judgment below.

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
WUNDERLICH, J.

[9] The Clarkes' challenge is to the reasonableness of county regulations on the construction of septic systems in lieu of sewer lines and construction of homes in areas not served by sewer lines. This is a challenge that the Clarkes should address to the county agencies. The correspondence of the Clarkes and their broker shows, however, that they realize that county requirements for septic tanks have only increased in stringency as the area has become less rural and general concern over groundwater contamination has increased. Prediction as to the future permissibility of any septic tanks in such areas is, in this light, entirely speculative.